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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In Re Marriage of TANSY and DENNIS SHEEHY.	
TANSY SHEEHY, Appellant, v. DENNIS SHEEHY, Respondent.	D052992 (Super. Ct. No. D498052)

APPEAL from an order of the Superior Court of San Diego County, Christine V. Pate, Judge. Affirmed.

Tansy Sheehy appeals a family court order denying her request, after the dissolution of her marriage to Dennis Sheehy, to move to England with the Sheehy's two

minor children. Tansy[1] argues that the court was required to grant the request because she was the children's primary caregiver and had a valid reason for the move.

"Move-away" requests and in particular international move-away requests present extremely difficult questions for family courts attempting to discern the best interest of minor children. These cases often involve "heart-wrenching circumstances" and invariably highlight the irreconcilable tension between a parent's desire to relocate with minor children, the children's need for stability and the benefits of regular access to both parents. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1101 (*LaMusga*).)

Accordingly, our Supreme Court has emphasized that "this area of law is not amenable to inflexible rules." (*LaMusga, supra,* 32 Cal.4th at p. 1101.) Instead, we must "permit our superior court judges . . . to exercise their discretion to fashion orders that best serve the interests of the children in the cases before them." (*Ibid.*) Reversal on appeal is warranted only upon a showing that the family court could not reasonably have concluded that its order was in the best interest of the children. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).)

In the instant case, the family court presided over a six-day trial and subsequently issued a comprehensive, written order resolving Tansy's move-away request as well as custody and visitation rights. The order demonstrates that the court gave careful consideration to the relevant factors and determined that relocation to England was not in

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1 As is customary in family law cases where the parties share a common last name, we refer to the parties by their first names. No disrespect is intended. (See *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475.)

the children's best interest. Having reviewed the order and the underlying record in light of the parties' arguments on appeal, we believe the family court's order is consistent with the controlling law and that its conclusions from the facts found fall comfortably within the bounds of reason. Consequently, while we acknowledge that this case is a difficult one, we affirm.

FACTS

Dennis and Tansy married in England in November 1996. The Sheehy's have two children: Lily, born in 1999; and Gabriel, born in 2001. Tansy and the children were born in England and are citizens of the United Kingdom. Dennis is a citizen of Ireland.

The Sheehy's moved to the United States in January 2002 to facilitate Dennis's career as a professional golf coach. Dennis and Tansy separated in August 2005. In the months following separation the couple attempted to arrange visitation consensually, with Dennis requesting time with the children through Tansy. Tansy filed a petition for dissolution of marriage in July 2006.

In April 2007, Tansy filed a request with the court for permission to relocate with the children to England. Dennis opposed the request. In July, the family court issued a "temporary order," "without prejudice to the ultimate custody and visitation orders to be made in this case," granting visitation rights to Dennis, but otherwise leaving the children in Tansy's custody.

A six-day trial was held in December 2007 to resolve Tansy's move-away request and establish a formal custody and visitation order. At the conclusion of the trial, the court took the matter under submission. The court subsequently issued a 16-page ruling.

In that ruling, the court denied Tansy's request to move to England with the children and set forth a formal custody order. The order states, in part, that "[t]he parents shall share joint legal and physical custody of the children regardless of where mother resides. If mother chooses to move to England, the primary residence of the children will be with the father. If she chooses to remain in San Diego County, the parties shall share primary residence . . . ."

DISCUSSION

Tansy argues that the family court "erred in denying [her] request to move to England with the children" and asks that we "reverse the order of the trial court and permit Tansy to move to England with the children."[2]

I.

Applicable Legal Principles

Move-away requests primarily arise in two distinct contexts: (i) an initial custody determination in which one parent, after dissolution of marriage but prior to the issuance of a final custody order, indicates his or her intent to move; and (ii) a request to modify a final custody order based on one parent's potential relocation. (See *Burgess*, *supra*, 13 Cal.4th at p. 37; *LaMusga*, *supra,* 32 Cal.4th at p. 1088.) The instant case concerns the former context. (See *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 257 (*Montenegro*)

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2 As the quoted language indicates, Tansy's appellate contentions are focused on the denial of the move-away request. She does not contend that the family court's order is erroneous in any other respect.

[initial custody determination is at issue absent "any final 'judicial custody determination'"].)

"In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan that is in the best interest of the child.'" (*Burgess*, *supra*, 13 Cal.4th at pp. 31-32; see Fam. Code,[3] § 3040, subd. (b).) The court "must look to *all the circumstances* bearing on the best interest of the minor child." (*Burgess*, at pp. 31-32.)

When the custody determination involves the "immediate or eventual relocation by one or both parents," the family court must also "take into account the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare." (*Burgess*, *supra*, 13 Cal.4th at p. 32; see § 7501 ["A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child"].)[4] "Accordingly, in considering all the circumstances affecting the 'best interest' of minor children," the court "may consider any effects of such relocation on their rights or welfare." (*Burgess*, *supra*, 13 Cal.4th at p. 32; see also *LaMusga*, *supra*, 32 Cal.4th at p. 1078 [reaffirming standard set forth in *Burgess*]; § 7501, subd. (b) ["It is the intent of the Legislature to affirm the decision in

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3 All statutory references are to the Family Code unless otherwise specified.

4 The statutory presumption does not apply "when parents *share* joint physical custody of the minor children under an existing order and in fact, and one parent seeks to relocate with the minor children." (*Burgess*, *supra*, 13 Cal.4th at p. 40.) Dennis does not contend that this is such a situation.

[*Burgess*] and to declare that ruling to be the public policy and law of this state"]; *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 955-956 (*Brown and Yana*) ["When the parents are unable to agree on a custody arrangement, the court must determine the best interest of the child by setting the matter for an adversarial hearing and considering all relevant factors, including the child's health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child's contact with the parents"].)

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*Burgess*, *supra*,13 Cal.4th at p. 32.) "The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*Ibid.*)[5]

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5 Tansy contends, without citation, that "[o]nly in unusual cases is a move-away request by a primary parent denied." Even assuming that her general point is correct, the sheer distance involved in the instant move-away request sets this case apart from the general run of move-away cases. (See, e.g., *Burgess*, *supra*, 13 Cal.4th at p. 28 [evaluating request to relocate "from Tehachapi to Lancaster, California, a distance of approximately 40 miles"]; *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 547 (*Condon*) [emphasizing relative complexities of international move-away requests].) In addition, the more pertinent generalization for purposes of this appeal is that only in unusual cases will reviewing courts reverse a family court's considered resolution of a move-away request. (See *LaMusga*, *supra*, 32 Cal.4th at p. 1092 [emphasizing that "[i]n only two cases have the Courts of Appeal reversed the superior court's exercise of discretion," in move-away cases, "and both cases involved unusual circumstances"].)

II.

The Abuse of Discretion Standard Applies

Tansy recognizes that the "standard of review for custody and visitation orders, including move-away orders, is whether the trial court abused its discretion." (See *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 714 (*Lasich*) ["It is well settled that the standard of review for custody and visitation orders, including move-away orders, is whether the trial court abused its discretion. . . . No different standard applies to international move-away orders"].) She contends, nevertheless, that we must review the family court's decision "de novo." Tansy explains that this is so because the family court "applied the incorrect legal standard" in that it failed to recognize that "the non-custodial parent, in this case Dennis[,] must show that the change in the residence of the children will cause detriment to the children."

Tansy's contention is erroneous on at least three grounds. First Tansy is simply wrong about the applicable legal standard. In fact, Tansy's contention in this regard is identical to that rejected in *Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 998 (*Ragghanti*):

> "Mother's argument that father had the burden to show proof of detriment resulting from her planned relocation is taken from language found in the *Burgess* case. *Burgess* explained how the trial court was to analyze move-away cases in two situations: first, when making an initial custody decision, and second, when the decision involves changing an existing final custody order. Mother's argument erroneously merges passages taken from these two separate discussions." (*Ragghanti*, at p. 997.)

As stated in *Ragghanti*, in an *initial* custody determination, "[t]he noncustodial parent does not have a burden to show that the move will be detrimental." (*Ragghanti*, *supra*,

123 Cal.App.4th at p. 998; see also Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 17:314, p. 17-77 ["When there has yet been no 'final' custody adjudication, a move-away contest is decided strictly under the child's 'best interest' analysis, considering all the relevant factors as on any initial custody adjudication. The changed circumstances rule and its associated burdens of proof do not apply"]; cf. *Brown and Yana*, *supra*, 37 Cal.4th at p. 956 [noting that "a variation on the best interest standard, known as the changed circumstance rule" applies "when a parent seeks modification of a final judicial custody determination"]; *Montenegro*, *supra*, 26 Cal.4th at p. 256 ["the changed circumstance rule applies 'whenever [final] custody has been established by judicial decree'"].)

This proposition is fully consistent with the presumption in section 7501.[6] As *Burgess* explains, in an initial custody determination, section 7501 compliments rather than supplants the best interest analysis. (Cf. § 7501, subd. (b) [asserting "the Legislature's intent 'to affirm the decision in [*Burgess*, *supra*,] 13 Cal.4th 25, and to declare that ruling to be the public policy and law of this state'"].) When an initial custody determination includes a move-away request, section 7501 does not shift the family court's focus away from a best interest analysis. Rather, the family court "consider[s] any effects of such relocation on the[children's] rights or welfare," as section 7501 requires, in resolving the interrelated move-away and custody requests

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6 Section 7501 provides that: "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." (§ 7501, subd. (a).)

under a best interest standard. (*Burgess*, at p. 32; Hogoboom & King, Cal. Practice Guide: Family Law Law, *supra*, ¶ 17:314.) For purposes of this best interest analysis, the parties stand on equal footing before the court. (*Burgess*, at p. 34 ["We discern no statutory basis, however, for imposing a specific additional burden of persuasion on *either* parent to justify a choice of residence as a condition of custody"].)

Second, even if Tansy were correct about the applicable legal standard, she does not cite any portion of the family court's order (or any other ruling below) that suggests the court applied an incorrect legal standard. Consequently, Tansy fails to meet her appellate burden of demonstrating a *legal* error in the court's ruling. It is a well established tenet of appellate review that "[i]n the absence of contrary evidence, we assume a trial court applied the correct legal standard." (See *People v. Eubanks* (1996) 14 Cal.4th 580, 598.)

Third, it is clear from the family court's written decision that Dennis did demonstrate that the proposed move would be detrimental to the children. The decision notes that if the court granted the move-away request, the children would have to change numerous aspects of their lives that would impact "their welfare: a. School[;] b. Teachers[;] c. Care givers[;] d. Doctors[;] e. Therapy for the son[;] f. Countries[;] g. Friends[;] h. Ability to share physical and emotional time with each parent weekly[; and] i. Ability to have frequent and continuing contact at both the emotional and physical level with each parent." In light of these (and other) factors, the court specifically found that "[t]he move of the children to England would be detrimental to the

best interests of the children";[7] that it "would prejudice the children's rights established by their long time presence in San Diego" and force the children "to give up their rights to ongoing daily activities and their father's presence." (See *Burgess*, *supra*, 13 Cal.4th at p. 36 ["A trial court may consider the extent to which the minor children's contact with the noncustodial parent will be impaired by relocating"]; cf. *Condon*, *supra*, 62 Cal.App.4th at p. 543 [noting that "the Legislature has created a statutory framework favoring joint custody, promoting the continued involvement of both parents in their children's lives, and establishing the best interests of the children as the paramount criteria to be applied in custody determinations"].)[8]

In sum, Tansy's contention that the family court's order is subject to de novo review because the family court applied an erroneous legal standard is without merit. Our review is for abuse of discretion.

III.

Tansy Fails to Demonstrate Any Abuse of Discretion

Our conclusion in the preceding section as to the applicability of the abuse of discretion standard severely undercuts Tansy's remaining contentions. While Tansy highlights a fair number of arguments throughout her briefing that might have supported

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7 Thus Tansy's puzzling contention in her brief that "Dennis failed to show the children would suffer detriment if they moved to England and *the Court failed to make such a finding*" is belied by the order itself. (Italics added.)

8 The order also emphasizes that, in light of the children's ties to San Diego, "the distance" from San Diego to England "weighs heavily against allowing the move away based on the detriment to the children's welfare."

a ruling in her favor, the issue on appeal is not whether we would have granted her request. For reversal on appeal, Tansy must show that the family court could not reasonably believe that the instant order "advanced the 'best interest' of the child[ren]." (*Burgess, supra*, 13 Cal.4th at p. 32.) She fails to do so.[9]

Tansy's primary argument is that the court "erred" in denying her move-away request because Tansy "had always been the primary caretaker and had a good faith reason . . . to move." The family court, however, explicitly considered these factors in its order and concluded that they were counterbalanced by other considerations. (*Burgess*, *supra*, 13 Cal.4th at pp. 31-32 [family court "'must look to *all the circumstances* bearing on the best interest of the minor child'"].)

The court recognized that Tansy had a valid reason to move ("a need for . . . a support system" of immediate family members) and that she, "more than father, has been the primary day to day parent for the children." The court noted, however, that the children "want to see and spend more time with their father," "benefit from the frequent and continuing contact both physically and emotionally with the father," and "[t]here is no reason that the primary custody or residence of the children cannot be with the father."

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9 In her reply brief, Tansy maintains that "the correct standard of review is de novo," but adds, for the first time, a contention that the order should still be reversed under the abuse of discretion standard because "there was a lack of reasonably credible evidence to support the order." To the extent Tansy is, by this comment, raising a generalized challenge to the evidence underlying the family court's factual findings, we reject that challenge as forfeited. (See *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4 [argument not raised in opening brief and not "fully made" in reply brief is forfeited for purposes of appeal].)

In addition, the court noted, "[b]oth children are bonded to both parents"; "[b]oth parents have been available to the children psychologically"; and "[t]here is no evidence to support a finding that either parent has been a more positive psychological parent for the children instead of the other."

In addition, the family court made a finding of "bad faith" on Tansy's part. (*Burgess*, *supra*, 13 Cal.4th at p. 36, fn. 6 [recognizing that "bad faith conduct may be relevant to a determination of what permanent custody arrangement is in the minor children's best interest"].) Specifically, it found that "[b]ad faith has evolved during this case," based, among other things, on Tansy's use of her control over visitation and the prospect of a unilateral move to England to frustrate Dennis's efforts to forge a closer bond with the children.[10] Following from this, the order states: "Based on mother's actions after separation, the court has grave concerns that Mother would not encourage frequent and continuing physical contact between the father and the children if they moved to England." (Cf. *LaMusga*, *supra*, 32 Cal.4th at p. 1100 [recognizing that even where there are "legitimate reasons for the proposed change in the child's residence," the family "court still may consider whether one reason for the move is to lessen the child's contact with the noncustodial parent"].) Given these findings, the family court could reasonably conclude that an international move would severely limit (and perhaps even terminate) Dennis's involvement in the upbringing of his children, resulting in significant

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10 These findings belie Tansy's contention that the family court "ignored the fact that Dennis, for whatever reason, had not been very involved in his children's lives."

detriment to the children. (See *id.* at pp. 1086, 1095 [explaining that the family court "reasonably concluded," in denying move-away request, that "the mother's consistent attempts to limit contact between the children and their father . . . made it unlikely that she would facilitate the difficult task of maintaining the father's long-distance relationship with the boys"].)

The court also reasonably concluded that a move to England did not offer any direct benefit to the children. The court found that the support system available to Tansy in England, consisting primarily of her extended family, "has had very limited and sporadic time with the children as a 'primary support system.'" In addition, the move would require the children to adjust to a series of changes, including changed doctors, teachers and friends, and would require regular long-distance travel to facilitate both parents' involvement in the children's day-to-day lives. The court noted that "[t]he mileage from San Diego to London[,] England is substantial"; "[t]here is no non-stop air flight"; and there was a potential that lengthy travel, through increased fatigue, could aggravate one of the children's medical condition. Finally, the court recognized that Tansy had an established support system in San Diego and a local job offer with salary equivalent to the employment offer she had in England. In light of these findings, the court reasonably could conclude that a move to England, while perhaps beneficial for Tansy, showed no particular benefit for the children; thus, "[t]he needs of the children were not being separated from the mother's desires to return to England." These considerations, as well as others highlighted in the family court's lengthy opinion — the bulk of which Tansy ignores on appeal — support the court's ultimate conclusion as to

the children's best interest. Consequently, we see no grounds upon which to conclude that the family court abused its discretion.[11]

Tansy highlights *Condon, supra*, 62 Cal.App.4th 533, which she notes involved a "similar" international move-away request. In that case, our colleagues in the Second District concluded that the family court did not abuse its discretion in fashioning an initial custody order permitting the mother to move, with minor children, from Los Angeles to Australia. (*Id.* at p. 554.) *Condon* does not demonstrate, however, that such move-away requests must be granted as a matter of law. Rather, it exemplifies the broad deference the appellate courts must grant family courts in this context.

In *Condon*, the Second District emphasized the unique problems inherent in an international move-away case, which will "likely . . . represent a de facto termination of the nonmoving parent's rights to visitation and the child's rights to maintain a relationship with that parent." (*Condon*, *supra*, 62 Cal.App.4th at p. 547.) It concluded, after expressing "concerns about relocation orders of this dimension" (*id*. at p. 536), and "[w]ith some reluctance" (*id*. at p. 535), that "[a]pplying the abuse of discretion standard *Burgess* reaffirmed, by a close margin we conclude the careful balance the trial court

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11 In her reply brief, Tansy contends that the family court should have disbelieved Dennis's testimony and given more weight to the testimony of Dr. Neil Ribner. Putting aside the fact that new arguments should not be raised in a reply brief, we find these arguments unpersuasive. The family court, as the finder of fact, is in a far better position to make credibility determinations and we are required to defer to its judgment as to credibility on appeal. (See *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 365 ["'Credibility is a matter within the trial court's discretion[,]' and the reviewing court must defer to the trial court's findings on credibility issues"].)

struck in this case could be reasonably found to serve the best interests of the Condon children." (*Id.* at p. 554.)[12]

Like the court in *Condon*, we recognize that there are reasonable arguments on both sides of this difficult issue. Also like that court, however, we must ultimately defer to the considered conclusion of the family court — the court that heard the witness testimony and interacted directly with the parties. On this record, the family court could reasonably conclude that denying Tansy's move-away request was in the best interest of the children. (*Burgess*, *supra*, 13 Cal.4th at p. 32 [emphasizing that the question on appeal "is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child"].) Consequently, we affirm.

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12 In her reply brief, Tansy also highlights *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 794, and *Lasich*, *supra*, 99 Cal.App.4th 702. Both cases are inapposite because they, like *Condon*, simply *affirm* the family court's resolution of a move-away order under the deferential abuse of discretion standard. In addition, our Supreme Court has criticized the reasoning in both cases, making them a questionable source of authority. (See *LaMusga*, *supra*, 32 Cal.4th at pp. 1097, 1099.)

DISPOSITION

Affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.